IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL Nos 832, 833 & 834 OF 1995

cr

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1,2 and 5 Yes

3 and 4 No

H.M.JOSHI

Versus

MANOJKUMAR JAIN

Appearance:

Criminal Appeal Nos.832,833 and 834 of 1995

Mr. A.R.Thakkar for Mr.J.R. Nanavati for the appellants in all the three matters.

Mr. H.R. Prajapati for respondent No.1 in Criminal Appeal No.832/95.

Mr. M.J. Budhbhatti for respondent No.1 in Criminal Appeal No.833/95.

No one appears for the respondent No.1 in Criminal Appeal No.834/95 despite service.

Mr. Umesh Trivedi, learned Addl. P.P. for the State of Gujarat in all the three Appeals.

CORAM : MR.JUSTICE M.R.CALLA

Date of decision: 04/09/96

COMMON JUDGMENT

1. The question which has engaged the attention of this Court in these three matters is as to whether a party like Municipal Corporation (Not being State as such) has the remedy of revision under S.397 of the Criminal Procedure Code before the Sessions Court, if it is aggrieved against the inadequacy of the sentence? In this context the relative scope and amplitude of Sections 377, 386, 397, 401(4) is required to be considered and further that in case such revision is held to be legally maintainable, whether the order passed by the Sessions Court rejecting the revision on the ground of the same being not maintainable is open to be remedied by this Court under S.482 Cr.P.C?

Criminal Appeal No.832/95

The Chief Judicial Magistrate, Bhavnagar passed an order dated 5-3-93 whereby he imposed a fine of Rs.300/- in default to undergo 5 days S.I. for the offence under S.398 of the Bombay Provincial Municipal Corporations Act, 1949 in Criminal Case No.16809/93 against the respondent No.1 for a municipal offence in the matter of evasion of octroi. Against this order dated 5-3-93, the Bhavnagar Municipal Corporation preferred a Criminal Revision Application No.117/95. The learned Sessions Judge, Bhavnagar by his order dated 1-7-95 held that the Revision Application under S.397 of Cr.P.C. was not maintainable. The grievance of the Bhavnagar Municipal Corporation before the Sessions Court was that the punishment of fine of Rs.300/- only was inadequate, meaning thereby that through the Revision Application before the learned Sessions Judge, Bhavnagar, Municipal Corporation had sought enhancement of the sentence. Against this order dated 1-7-95 passed by the learned Sessions Judge, Bhavnagar holding the Criminal Revision Application to be not maintainable under S.397 of Cr.P.C., Bhavnagar Municipal Corporation has preferred the present Appeal under S.377 read with S.386 and S.482 of the Cr.P.C.

Criminal Appeal No.833/95

The Chief Judicial Magistrate, Bhavnagar passed an order dated 4-3-93 imposing a fine of Rs.250/- and in default to undergo 5 days S.I. against the respondent No.1 for an offence under S.398 of the Bombay Provincial Municipal Corporations Act, 1949 in Criminal Case

No.16800/93. Against this order dated 4-3-93, Bhavnagar Municipal Corporation preferred a Revision Application before the Sessions Court, Bhavnagar under S.397 of the Cr.P.C. with a grievance that the fine of Rs.250/- is inadequate and thus the Revision for enhancement of the sentence. This Revision Application was held to be not maintainable by the learned Sessions Judge, Bhavnagar by order dated 1-7-95 passed in Criminal Revision Application No.119/95. Against this order dated 1-7-95 passed by the learned Sessions Judge, Bhavnagar this Appeal has been preferred under S.377 read with S.386 and S.482 of the Cr.P.C.

Criminal Appeal No.834/95

The Chief Judicial Magistrate, Bhavnagar passed an order dated 5-3-93 imposing a fine of Rs.300/- and in default to undergo 3 days S.I. against the respondent No.1 for an offence under S.398 of the Bombay Provincial Muncipal Corporations Act, 1949 in Criminal Case No.16802/93. Against this order dated 5-3-93 Bhavnagar Municipal Corporation preferred a Revision Application before the Sessions Court, Bhavnagar under S.397 of Cr.P.C. with a grievance that the fine of Rs.300/- is inadequate and thus the Revision for enhancement of the sentence. This Revision Application was held to be not maintainable by the learned Sessions Judge, Bhavnagar by order dated 1-7-95 passed in Criminal Revision Application No.118/95. Against this order dated 1-7-95 passed by the learned Sessions Judge, Bhavnagar this Appeal has been preferred under S.377 read with S.386 and 482 of the Cr.P.C.

2. While challenging the orders dated 1-7-95 passed by the learned Sessions Judge, Bhavnagar in all the three aforesaid Criminal Revision Applications, Mr. Thakkar appearing for the Bhavnagar Municipal Corporation has submitted that the Revision Applications filed by the Bhavnagar Municipal Corporation under S.397 of the Cr.P.C. were maintainable, but the learned Sessions Judge has committed a serious jurisdictional error while holding that the Revision Applications were not maintainable under S.397 of the Cr.p.C.

3. Mr. Budhbhatti and Mr. Prajapati appearing on behalf of the respondents in the respective Appeals in which they are representing the respondent No.1 have submitted that in case of inadequacy of the sentence, the Appeal could be preferred under S.377 of the Cr.P.C. and under S.401(4) of Cr.P.C. In case no Appeal is preferred for enhancement of the sentence, no proceedings by way of

Revision could be entertained at the instance of the party and, therefore, the Revisions have been rightly held to be not maintainable by the Sessions Court. It has been further argued by them that the present impugned orders are the orders which have been passed by the learned Sessions Judge rejecting the Revisions preferred under S.397 of the Cr.P.C. and there is no question of second revision or any Appeal against the impugned orders rejecting the Revision Applications.

4. I have heard learned counsel appearing on behalf of the appellants and the respondents in each of these three matters and the learned Addl.P.P. So far as the maintainability of the Appeals under S.377 and the exercise of the powers by this Court under S.386 as an Appellate Court are concerned, I do find that the Appeals, as such, are not maintainable under S.377 at the instance of the Bhavnagar Municipal Corporation because no Appeal is provided against the order passed by the Sessions Court in the proceedings under S.397 of the Cr.P.C. S.377 provides for the Appeal by the State Government against the sentence on the ground of its inadequacy and whereas the present impugned orders have been passed under S.397 by the Sessions Court while exercising the powers under S.397, there is no question of entertaining the present Appeals under S.377 by this Court nor the powers of this Court could be exercised as an Appellate Court under S.386 for the purpose of enhancing the sentence. Thus the grievance of the present appellants i.e. Bhavnagar Municipal Corporation cannot be entertained either with reference to S.377 or with reference to S.386 of the Cr.P.C.

5. I, however, find that the present appellants have also invoked the inherent powers of this Court under S.482 of the Cr.P.C. Once it is held that neither the impugned orders passed under S.397 of the Cr.P.C. could be challenged before this Court under S.377 nor the powers of the Appellate Court under S.386 could be exercised by this Court against the inadequate sentence, the question arises as to whether in matters like this when a body like a Municipal Corporation has to challenge an order on the ground of inadequacy of the sentence, whether it has any remedy before the Sessions Court against an order of sentence passed by the Chief Judicial Magistrate in case the Municipal Corporation is aggrieved on the ground of inadequacy of sentence. A reading of S.377 would make it clear that the Bhavnagar Municipal Corporation could not have preferred an Appeal for enhancement of the sentence under S.377 because this Section specifically deals with the State Government

directing the Public Prosecutor to present the Appeal in proper case against the sentence on the ground of its inadequacy. Thus the remedy under S.377 for filing the Appeal was not available to Bhavnagar Municipal Corporation. Once I find that the order passed by the Chief Judicial Magistrate could not be appealed against under S.377 by Bhavnagar Municipal Corporation, the question arises as to whether the Bhavnagar Municipal Corporation could have invoked the powers of this court straightaway under S.401 by way of filing a Criminal Revision Application since the Appeal under S.377 is not maintainable at the instance of Bhavnagar Municipal Corporation against the inadequate sentence and the provisions of S.401 (4) could not come in the way of the Bhavnagar Municipal Corporation had it preferred a Revision before this court straightaway. But the facts of present case indicate that the Municipal Corporation, Bhavnagar had preferred Revision Applications before the Sessions Court under S.397 of Cr.P.C. Whereas the revisional powers of the Sessions Court had already been invoked by the present appellants, the present Appeals could not be entertained even as Revisions under S.401 against the order of the learned Sessions Judge because there is no question of second revision under the provisions of the Cr.P.C. Thus, the grievance of the present appellants cannot be entertained either under S.377 or under S.386 or under S.401 of the Cr.P.C. by this Court. The question yet arises as to whether the orders dated 1-7-95 passed by the Sessions Court, holding the Revisions filed by Bhavnagar Municipal Corporation to be not maintainable, suffers from any jurisdictional error or not and in case it is found to be suffering from any jurisdiction error, whether this Court can not correct such error relating to the process of the court and the jurisdictional error, under S.482 of the Cr.P.C. Although Mr. Budhbhatti has submitted that the powers under S.482 of the Cr.P.C. could not be invoked by the appellants in an order passed against it under S.397 of the Cr.P.C., he has failed to point out any specific provision in Cr.P.C. under which the present appellants have any remedy against the orders of the Sessions Court passed in Revision Applications. When there is no specific provision under which the appellants can avail any remedy, they can not be left without any remedy. In such cases the inherent powers of this court under S.482 could certainly be invoked if it finds that the orders, which are impugned, suffer from any jurisdictional error and would frustrate the purpose of process of the court leaving an aggrieved party to be remediless.

6. So far as the provisions of S.397 of the Cr.P.C.

are concerned, I find that the learned Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court and, therefore, I find that the learned Sessions Judge had ample power to consider the grievance of the present appellants in the Revision Applications, which were filed before the Sessions Court and such Revisions were maintainable. It is clearly mentioned in S.397 that the correctness, legality or propriety of the sentence can be considered by the learned Sessions Judge and, therefore, the question of inadequacy of the sentence could certainly be adjudicated by the Sessions Court in Revision Application at the instance of the Bhavnagar Municipal Corporation and Revisions were maintainable and hence the impugned orders rejecting the Revision Applications, on the ground of maintainability, can not be said to have been passed in accordance with law.

7. Mr. Thakkar has submitted that the learned Sessions Judge has failed to comprehend the correct import of S. 397 of Cr.P.C. and has wrongly applied XXII GLR 895 i.e. State v. Purani Jagatpawandas. S.397 of the Cr.P.C. is reproduced as under:

"397 Calling for records to exercise powers of revision.- (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness,legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such infrior Court, and may, when calling for such record,direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- All Magistrates, whether Executive or judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial

or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

In the case of Purani Jagatpawandas (Supra) the eleven conclusions arrived at by the Division Bench, as recorded in para 25, are as under:

(1) Section 11 (2) of the Act confers a right of appeal notwithstanding anything contained in the Code;

(2) Such right of appeal is conferred both on the accused as well as the prosecution (State);

(3) The appeal can lie only against the order of the Court trying the offender;

(4) The challenge in such an appeal is limited to the propriety of the order made under section 3 or section 4 of the Act;

(5) Article 115 of the Limitation Act, 1963 is not attracted to such an appeal and hence the appeal can be filed within a reasonable period;

(6) What should be the reasonable period would depend on the facts and circumstances of each case;

(7) The forum for such an appeal by the State is the High Court and not the Sessions Court (the view to the contrary expressed in Nakubhai's case (supra) and in Gabha Mavji's case (supra) does not lay down the correct law);

(8) If an appeal is decided on merits after hearing both sides, even if the order of the trial Court is confirmed, it merges in the order of the appellate Court and no appeal can then lie against the appellate Court's order;

(9) The High Court can exercise revisional jurisdiction under sec.11(4) of the Act against the order of the appellate Court or against the trial Court's order if no appeal is filed regardless of the fact as to how and by whom the High Court's attention is drawn to the facts of that case;

(10) The restriction contained in sec.401(4) of the Code does not have any relevance to the exercise of revisional powers by the High Court even if the attention of the High Court is drawn by the party which could have appealed; and

(11) The High Court will exercise its revisional jurisdiction sparingly.

The Division Bench in this case gave the interpretation of sub-sections (2) and (4) of S.11 of the Probation of Offenders Act, 1958. The Chief Judicial Magistrtate, Nadiad vide his order dated 19-12-79 had convicted the respondent Purani Jagatpawandas and his two companions under S.406 of I.P.C. The two companions were directed to suffer RI for one year and to pay a fine of Rs.1000/-, but the respondent - Purani Jagatpawandas convicted under S.406 of I.P.C. was released on probation of good conduct undr S.4(1) of the Probation of Offenders Act, 1958. Against this order of conviction, the respondent Purani Jagatpawandas and his two companions had preferred an Appeal before Addl. Sessions Judge, Nadiad, who by his order dated 24-1-80 confirmed the conviction of respondent-Purani Jagatpawandas, but set aside the conviction and sentence imposed upon his two companions. Against the said order of confirmation of conviction, respondent - Purani Jagatpawandas filed a Revision Application and this Revision Application was rejected in limine on 28-4-80. On 21-4-80 the State had preferred a Revision Application under S.11(4) of the Probation of Offenders Act, 1958 challenging the legality and propriety of the order, which had been passed in favour of Purani Jagatpawandas under S.4 of the Probation of Offenders Act, 1958 by the Chief Judicial Magistrate, Nadiad. In the context of these facts, the Division Bench considered the question regarding the construction of sub-sections (2) and (4) of S.11 of the Act and came to the conclusions 1 to 11, as have been reproduced herein-above from para 25 of the Judgment. It is in this background that the Division Bench also considered the views expressed in Nakubhai's case decided by this Court i.e. State of Gujarat v. Nakubhai Meghabhai, Criminal Appeal No.881/77 and State v. Gabha Mavji, reported in 20 GLR 959 and it was ruled by the Division Bench that these two decisions do not lay down the correct law. The Division Bench had held that the right of Appeal conferred under S.11 (2) of the Probation of Offenders Act was available to accused as well as the prosecution i.e. State and it was also held that the High Court can

exercise revisional jurisdiction under S.11(4) of the Act against the order of the Appellate Court or against the trial Court's order, if no Appeal is filed regardless of the fact as to how and by whom the High Court's attention is drawn to the facts of that case and further that the restriction contained in S. 401 (4) of the Code does not have any relevance to the exercise of revisional powers by the High Court even if the attention of the High Court is drawn by the party which could have appealed. The only word of caution given by the Division Bench is that the High Court will exercise its revisional jurisdiction sparingly. On these premises it was held by the Division Bench that the view to the contrary expressed in Nakubhai's case (Supra) and Gabha Mavji's case (Supra) does not lay down the correct law. It is not discernible from any of the conclusions arrived at by the Division Bench in the aforesaid case that the Revision under S.397 before Sessions Court is not maintainable with regard to the grievance of the inadequacy of the sentence, more particularly when the party like Municipal Corporation had no remedy to prefer the Appeal for enhancement of the sentence under S.377 of the Cr.P.C. before this Court nor in fact it had availed any such remedy as the remedy of preferring Appeal under S.377 is available to the State. It is, therefore, clear that it is a case of not appreciating the correct import of S.397 of Cr.P.C. and wrong application of the law laid down by the Division Bench, as has been done by the Sessions Court while holding the revision to be not maintainable and rejecting it as such.

8. Thus, as I have already held, the Bhavnagar Municipal Corporation could straightaway come in Revision before this Court. Merely because it did not come in Revision before this Court and preferred a Revision petition before the Sessions Court, which too was maintainable under S.397 of the Cr.P.C., it can not be said that if the Revisions have been wrongly held to be not maintainable by the Sessions Court, the Municipal Corporation should still be left without any remedy before this Court and that their grievance should not be considered under the inherent powers of this Court under S.482 of the Cr.P.C. against the Sessions Court's order holding the revision to be not maintainable. In my opinion, in the peculiar facts and circumstances of this case, even the provisions contained in sub-section (3) of S.397 would not come in the way of the Municipal Corporation because the Revision Applications preferred by it before the Sessions Court have not been rejected on merits, but had been rejected on the ground that it was not maintainable. No doubt sub-section (3) of S.397 says

that if an application under this Section had been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by either of them. But here is a case in which the Applications, which have been preferred by the Municipal Corporation before the Sessions Court, have not been adjudicated on merits and they have been rejected as not maintainable and this view taken by the learned Sessions Judge is not in conformity with the scope of S.397 of the Cr. P.C. and it is found that the view taken by the learned Sessions Judge is based on an incomprehensible import of the Division Bench decision of this Court in Purani Jagatpawandas's case (Supra). Accordingly I hold that the Revisions were maintainable before the learned Sessions Judge and in matters like this, when the properly vested jurisdiction has been refused to be invoked, the grievance of the party approaching this Court deserves to be redressed under S.482 of the Cr.P.C. When the adjudicatory process has been made abortive without comprehending the correct import of S. 397 and by wrong application of law, the order cannot but be said to put the mark of silence on the process of the court and such an order may be held to be open to be corrected under S.482 of the Cr.P.C. Accordingly, it is held that on the ground of inadequacy of the sentence when the Municipal Corporation could not have preferred Appeal under S.377, it had the remedy of either straightaway coming before this court under S.401 of the Cr.P.C. or to approach the Sessions Court under S.397 of the Cr.P.C. The Revision Applications preferred by the Municipal Corporation under S.397 having been wrongly rejected by the Sessions Court on the ground of maintainability, the impugned orders are found to be suffering from serious jurisdictional error, denial of the invoking of the jurisdiction, which was properly vested in the Sessions Court and hence due benefit of the process of the court and the relevant provisions stand denied to the Municipal Corporation with regard to seeking the adjudication of its grievance against inadequacy of the sentence.

9. Accordingly the impugned orders dated 1-7-95 passed by the Sessions Judge, Bhavnagar in each of the three revisions are held to be unlawful in all the three cases and the same are hereby quashed and set aside. All these three matters are remanded back to the learned Sessions Judge, Bhavnagar to decide the Revision Applications of the Bhavnagar Municipal Corporation on merits. It is made clear that nothing observed or said in this common order, while holding the Revisions to be maintainable before the Sessions Court under S.397, shall

have any effect on the merits of the case before the learned Sessions Judge while deciding the Revision Applications and the Revision Applications of the Municipal Corporation shall be decided by the Sessions Court in accordance with law on merits. All the three matters are disposed of accordingly.

-0-